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# THE CASE FOR REVISITING CONTINGENT LIABILITIES UNDER ARTICLE VIII

Joshua Hansen-King

*Abstract:* Prior to 2012, Washington municipalities frequently relied on contingent-liability agreements (“CLA” or “CLAs”) to reduce borrowing costs because such liabilities did not constitute debt under article VIII of the Washington State Constitution. But the viability of CLAs was called into question by the Washington State Supreme Court’s 2012 plurality decision in *In re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District* (“Wenatchee Events Center”), which applied a new method for determining what constitutes debt—the risk-of-loss principle—to conclude that the entire value of a CLA constitutes debt. This Essay urges the Court to revisit the opinion because the decision fails to offer clear guidance and relies on an unpersuasive distinction between debt and indebtedness to explain the holding. Additionally, this Essay argues that the risk-of-loss principle is not the correct standard for municipal debt because the framework is not supported by Washington precedent and the principle is a novel approach that disregards the origins of Washington’s debt provisions. If the Court decides to continue treating CLAs as debt, this Essay suggests the Court should not follow *Wenatchee Event Center*’s conclusion that the entire value of the CLA is debt and instead adopt the approach of the Generally Accepted Accounting Principles for governments: The amount of debt equals only that portion that is likely to become owed.

## INTRODUCTION

Before 2012, Washington municipalities commonly used contingent-liability agreements (“CLA” or “CLAs”)<sup>1</sup> to help other municipalities reduce borrowing costs by making it easier to secure affordable bond rates.<sup>2</sup> Under these agreements, a municipality typically agreed to pay the borrower’s debt or provide a loan only if the borrower—often another municipality—was unable to pay bondholders.<sup>3</sup> After executing

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1. Contingent liabilities are “liabilities or obligations which become the financial responsibility of another at a given date when certain conditions are not met.” ROY J. KOEGEN, WASHINGTON MUNICIPAL FINANCING DESKBOOK 522 (1993). CLAs are one method of creating contingent liabilities.

2. See Brief of Amicus Curiae Washington State Treasurer in Support of Direct Review at 2, 10–11, *In re Bond Issuance of Greater Wenatchee Reg’l Events Center Pub. Facilities Dist.*, 175 Wash. 2d 788, 287 P.3d 567 (2012) (No. 86552-3) [hereinafter Brief of Amicus Curiae in Support of Direct Review]. The amount secured by CLAs is significant; these agreements back more than \$271 million in bonds. *Id.* at 10 (calculating the value of CLAs secured by public facilities district but not including other municipal corporations).

3. Brief of Amicus Curiae Washington State Treasurer at 1–2, *In re Bond Issuance of Greater Wenatchee Reg’l Events Center Pub. Facilities Dist.*, 175 Wash. 2d 788, 287 P.3d 567 (2012) (No.

a CLA, the borrower's debt secured by the agreement was not counted towards the non-borrowing municipality's constitutional debt limit because their obligation to pay or lend money was contingent on the borrower not paying.<sup>4</sup> This practice was approved by *Comfort v. City of Tacoma*,<sup>5</sup> a 1927 Washington State Supreme Court decision that established the contingent-liability doctrine.<sup>6</sup> This doctrine, however, was called into question by the Court's 2012 plurality decision in *In re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District* ("Wenatchee Events Center").<sup>7</sup>

In *Wenatchee Events Center*, the Court evaluated a proposed CLA between the City of Wenatchee (the "City") and the Greater Wenatchee Regional Event Center Public Facilities District (the "District").<sup>8</sup> Under the proposed agreement, the City would be obligated to make a loan to the District if the District lacked sufficient funds to meet its bond-payment obligations.<sup>9</sup> The lead opinion concluded that the potential obligation under the proposed agreement was debt under the Washington State Constitution article VIII.<sup>10</sup> The plurality reached this conclusion by: (1) distinguishing between "debt" and "indebtedness"—the key terms used to restrict state and municipal debt respectively<sup>11</sup>—and (2) deducing the existence of the risk-of-loss principle.<sup>12</sup> After recognizing the principle, the Court applied it to determine whether a contingent liability is a debt of a municipality.<sup>13</sup> In doing so, the lead

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86552-3) [hereinafter Brief of Amicus Curiae].

4. *Comfort v. City of Tacoma*, 142 Wash. 249, 255–56, 252 P. 929, 931 (1927).

5. *Id.* at 255, 252 P. at 931.

6. *See In re Bond Issuance of Greater Wenatchee Reg'l Events Center Pub. Facilities Dist.*, 175 Wash. 2d 788, 800, 287 P.3d 567, 573 (2012) [hereinafter *Wenatchee Events Center*] (plurality opinion) (discussing *Comfort*'s "contingency doctrine").

7. 175 Wash. 2d 788, 287 P.3d 567 (2012) (plurality opinion). While five justices signed the opinion, one of the signatories concurred in the result only. *Id.* at 810, 287 P.3d at 578 (noting that Justice Wiggins's lead opinion was signed by Justices C. Johnson, J. Johnson, González, and Stephens, but that Justice Stephens concurred only in the result). Washington State courts treat such a decision as a plurality. *See, e.g., Kailin v. Clallam Cnty.* 152 Wash. App 974, 985, 220 P.3d 222, 226–27 (2009) (stating there was no majority opinion when four justices signed onto the reasoning and a fifth concurred in the result only).

8. *Wenatchee Events Center*, 175 Wash. 2d at 791, 287 P.3d at 569.

9. *Id.* at 793, 287 P.3d at 570.

10. *Id.* at 791–92, 287 P.3d at 569.

11. *Id.* at 806–07, 287 P.3d at 577.

12. *See id.* at 798 n.9, 287 P.3d at 572 n.9. The principle means there is debt when taxpayers could be responsible for a payment, *id.* at 798–99, 287 P.3d at 573, and is discussed further *infra* Part I.C.2.a.

13. *Wenatchee Events Center*, 175 Wash. 2d at 801–02, 287 P.3d at 574.

opinion rejected *Comfort*'s contingent-liability doctrine<sup>14</sup> but also noted that the opinion was not overruling *Comfort*—instead, the plurality distinguished the contingent liability in *Wenatchee Events Center* from the similar agreement in *Comfort*.<sup>15</sup> Specifically, *Wenatchee Events Center* focused on how the City's CLA secured the District's entire repayment obligation while *Comfort*'s contingent agreement secured only a portion of the primary debtor's obligation.<sup>16</sup> For the lead opinion, this meant *Wenatchee Events Center* presented debt because the agreement was properly construed as a guaranty while *Comfort* did not create debt because the underlying agreement could properly be called a contingent obligation.<sup>17</sup>

The decision in *Wenatchee Events Center* creates two significant problems. First, the lead opinion fails to offer clear guidance on CLAs to lower courts or municipalities because: (1) as a plurality opinion, the decision has limited precedential value;<sup>18</sup> and (2) the opinion appeared to both approve and reject the contingent-liability doctrine.<sup>19</sup> This uncertainty about the treatment of CLAs will disrupt municipal borrowing by increasing borrowing costs, impeding cooperation between municipalities, and making it difficult to ascertain the value added by these agreements.<sup>20</sup> Second, the opinion's treatment of contingent liabilities could disrupt municipal planning or existing projects by forcing municipalities to suddenly recognize new debt from pre-existing CLAs, which could push municipalities beyond their constitutional limits and prevent them from incurring new debt.<sup>21</sup>

In response to these practical concerns about the effects of *Wenatchee Events Center* and issues with the opinion's analysis (discussed *infra*),

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14. *Id.* at 800–01, 287 P.3d at 574.

15. *Id.* at 802, 287 P.3d at 574 (noting that “*Comfort* may well have been correctly decided on its facts” and explaining how *Comfort* is distinguishable from *Wenatchee Events Center*).

16. *Id.*

17. *Id.*

18. *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) (noting that “[a] plurality opinion has limited precedential value and is not binding on the courts”).

19. *Infra* Part I.C.2.b.

20. Brief of Amicus Curiae, *supra* note 3, at 7.

21. Brief of Amicus Curiae in Support of Direct Review, *supra* note 2, at 10–11. While the lead opinion did not opine on whether its holding would have applied to preexisting CLAs because *Wenatchee Events Center* only concerned a proposed agreement, municipalities have nonetheless treated the opinion as having retroactive effect by recognizing preexisting CLAs as debt. *See, e.g.*, KING CNTY., WASH., OFFICIAL STATEMENT, 27 (Nov. 13, 2012), available at <http://www.emma.msrb.org/EA485733-EA376808-EA773580.pdf>; HOUS. AUTH. OF SNOHOMISH CNTY., OFFICIAL STATEMENT, 20 (Dec. 5, 2012), available at <http://emma.msrb.org/EP724576-EP562183-EP963365.pdf>.

this Essay: (1) asserts that the Court should revisit, correct, and clarify the treatment of contingent liabilities; and (2) proposes an alternative standard for when these liabilities should be recognized as debt. Part I explains the applicable parts of Washington's constitutional debt limits and the lead opinion in *Wenatchee Events Center*. Part II argues that *Wenatchee Events Center*'s analysis and conclusion are problematic, and proposes a different standard based on the Generally Accepted Accounting Principles.

## I. CONSTITUTIONAL DEBT LIMITS BEFORE AND AFTER *WENATCHEE EVENTS CENTER*

An examination of *Wenatchee Events Center* requires an understanding of Washington's constitutional debt limits. Accordingly, this Essay begins with an examination of the Washington State Constitution article VIII, sections 1 and 6—specifically, those sections' origins, text, and interpretation—before concluding with a summary of *Wenatchee Events Center*'s lead opinion.

### A. *Constitutional Restrictions on Debt in Washington*

Before turning to Washington's debt limits, this Essay highlights the impetus for these limits and the background against which they were enacted.

#### 1. *National Trends Influenced Washington's Debt Limits*

Washington's constitution, drafted in 1889, came at the end of a century that saw two waves of constitutional reform aimed at limiting public debt.<sup>22</sup> The first wave targeted state debt as a response to the Financial Panic of 1837 when states that had borrowed aggressively were unable to meet their obligations.<sup>23</sup> These changes left municipal debt unchecked.<sup>24</sup> The second wave, starting in the 1870s, targeted municipal debt as a response to rapid, unchecked increases in spending that left many municipalities near bankruptcy with little to show for their efforts.<sup>25</sup>

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22. Reuven Mark Bisk, Note, *State and Municipal Lease—Purchase Agreements: A Reassessment*, 7 HARV. J.L. & PUB. POL'Y 521, 525–26 (1984).

23. *Id.*

24. *Id.* at 525.

25. See C. Dickerman Williams & Peter R. Nehemkis, Jr., *Municipal Improvement as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177, 177–78, 180 (1937).

While the first wave favored absolute limits on state debt, the second wave eschewed specific amounts in favor of linking municipal-debt limits to a floating value.<sup>26</sup> These municipal provisions generally use similar language and structure: restricting debt to a set percentage of the assessed value of taxable property in the municipality.<sup>27</sup> These constitutional sections were designed to prevent municipalities from indulging in extravagant or improvident purchases that they could not afford by shifting the cost to future generations.<sup>28</sup>

Towards the end of the debt-limit movement's second wave, Washington held its constitutional convention.<sup>29</sup> The delegates were aware of the recent additions of debt-limit provisions to various state constitutions<sup>30</sup> and were guided by similar concerns: the dangers of unlimited debt and detrimental effect of unrestrained indebtedness on future prosperity.<sup>31</sup> Specifically, the delegates wanted limits that would protect people from the type of bad decisions that led to government bankruptcies in the 1800s,<sup>32</sup> guard taxpayer credit,<sup>33</sup> and prevent the oppression that develops from potentially ruinous taxation.<sup>34</sup> In pursuit of these goals, the delegates chose constitutional debt limitations because those at the convention believed: (1) political checks were

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26. See Bisk, *supra* note 22, at 525.

27. C. Robert Morris, Jr., *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 241 (1958) (noting that nearly every state constitution limits municipal debt to a percentage of the value of taxable property); *infra* note 40 (comparing debt-limit language between states).

28. Williams & Nehemkis, *supra* note 25, at 180. Although the restrictions were designed as rigid barriers, the limits have been construed more liberally to avoid crippling municipalities' ability to function effectively. Dennis J. Heil, *Another Day Older and Deeper in Debt: Debt Limitation, the Broad Special Fund Doctrine, and WPPSS 4 and 5*, 7 U. PUGET SOUND L. REV. 81, 86 (1983) (noting there has been a nation-wide trend of courts approving devices for evading local-debt limits in response to rigid debt-limit provisions).

29. See HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 54 (1916) (listing the 27 states that adopted limits between 1867 and 1907); *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 WITH ANALYTICAL INDEX 1* (Beverly Paulik Rosenow ed., 1999) [hereinafter JOURNAL] (indicating the convention began on July 4, 1889); Bisk, *supra* note 22, at 525 (noting that municipal-debt limits "quickly followed" the Depression of 1873).

30. See JOURNAL, *supra* note 29, at 44–45 (reprinting a letter presented to the delegates that highlighted other states' constitutional provisions restricting debt).

31. *Id.* at 667; see also *Dep't of Ecology v. State Fin. Comm.*, 116 Wash. 2d 246, 257, 804 P.2d 1241, 1246 (1991) (plurality opinion).

32. *Dep't of Ecology*, 116 Wash. 2d at 257–58, 804 P.2d at 1246.

33. *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 99 Wash. 2d 772, 801, 666 P.2d 329, 344 (1983) (Dore, J., concurring).

34. *Id.* (quoting 56 AM. JUR. 2d *Municipal Corporations* § 599, at 651 (1971)).

insufficient<sup>35</sup> and (2) a constitution without such limits would render municipal bonds worthless<sup>36</sup>—a belief likely driven by the history of municipal bankruptcies, caused by unchecked spending, that impaired bond repayment.<sup>37</sup>

With goals that were similar to the other states that had already enacted limits, the convention delegates discussed proposals that mirrored versions passed in other states.<sup>38</sup> Ultimately, the delegates enacted stringent constitutional restrictions on the ability of the state and municipalities to incur debt<sup>39</sup> in line with provisions enacted earlier in other states.<sup>40</sup> Like other jurisdictions, the delegates created provisions imposing an “impassable barrier”<sup>41</sup> designed “for the protection of minorities, for the protection of posterity, and to protect majorities against their own improvidence.”<sup>42</sup>

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35. See *Wenatchee Events Center*, 175 Wash. 2d 788, 796, 287 P.3d 567, 571 (2012) (plurality opinion).

36. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 160 (2d ed. 2013).

37. See Bisk, *supra* note 22, at 525 (explaining that constitutional debt limits developed in response to local government bankruptcies caused by fiscal imprudence).

38. See ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, *MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE* § 4.2, 171 (1992) (discussing how states often enacted absolute limits on state debt while linking municipal-debt limits to a percentage of assessed property value); JOURNAL, *supra* note 29, at 668–71, 675–79 (documenting that the delegates considered absolute limits on state debt and dynamic limits on municipal debt linked to a percentage of property values).

39. WASH. CONST. art. VIII, § 1 (amended 1972); WASH. CONST. art. VIII, § 6 (amended 1952).

40. See *State ex rel. Troy v. Yelle*, 36 Wash. 2d 192, 204, 217 P.2d 337, 343 (1950) (“Many states have constitutional provisions generally similar to [article VIII] of our constitution.”); Arthur S. Beardsley, *Sources of the Washington Constitution*, in 2011–2012 LEGISLATIVE MANUAL 385, 411 (noting that section 6 is similar to a provision in Illinois’ Constitution). Compare WASH. CONST. art. VIII, § 6 (stating that no municipality “shall for any purpose become indebted in any manner to an amount exceeding” a certain percentage), with IND. CONST. art. 13, § 1 (stating that no municipality “shall ever become indebted, in any manner or for any purpose to an amount, in the aggregate, exceeding” a certain percentage), and WIS. CONST. art. XI, § 3(2) (stating that no municipality “may become indebted in an amount that exceeds” a certain percentage). The similarities are not surprising because the delegates were aware of the practices in other states. JOURNAL, *supra* note 29, at 44–45.

41. *State ex rel. Jones v. McGraw*, 12 Wash. 541, 543, 41 P. 893, 894 (1895). It is questionable, however, how strict and impassable the barrier is when the Court has determined multiple funding mechanisms are not debt and permitted municipalities to exceed their debt limit for public emergencies. See *Wenatchee Events Center*, 175 Wash. 2d 788, 796–97, 287 P.3d 567, 571–72 (2012) (plurality opinion) (noting the various principles and interpretations the Court has used to exclude obligations from implicating the debt limits); cf. Heil, *supra* note 28, at 86 (recognizing a national trend of courts approving methods for evading rigid limits).

42. *State ex rel. Potter v. King Cnty.*, 45 Wash. 519, 528, 88 P. 935, 938 (1907).

## 2. *Washington's Constitutional Limits on State and Municipal Debt*

Motivated by concerns expressed throughout the two debt movements of the 1800s, the delegates at Washington's Constitutional Convention settled on two separate limits: one for municipalities and another for the state.

Article VIII, section 6 permits municipalities to become indebted for a public purpose but limits the amount of debt they can incur.<sup>43</sup> Under section 6:

No county, city, town, school district, or other municipal corporation *shall for any purpose become indebted in any manner* to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation without the assent of three-fifths of the voters . . . .<sup>44</sup>

This provision has remained substantively unchanged since the Constitution was ratified.<sup>45</sup>

Relatedly, article VIII, section 1 limits state debt. The original provision restricted the state to \$400,000 of debt.<sup>46</sup> In 1972, section 1 was amended to make the limit a floating number based upon a percentage of general revenues over a specific number of years.<sup>47</sup> Despite the significant change, the Court has concluded that the underlying purpose of section 1 remains the same.<sup>48</sup> The state debt limitation was further amended in 1999 and in 2012; however, the function and structure remain generally the same as the 1972 version.<sup>49</sup>

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43. WASH. CONST. art. VIII, § 6.

44. *Id.* (emphasis added). Municipalities may also seek voter approval to incur debt up to five percent of the assessed value of property and can become indebted up to an additional five percent without voter approval for certain municipal-controlled utilities. *Id.*

45. *See* Washington State Constitution, WASHINGTON STATE LEGISLATURE, <http://www.leg.wa.gov/lawsandagencyrules/Pages/constitution.aspx> (last visited April 11, 2015) (indicating there has only been one amendment to article VIII, section 6). The only changes to section 6 occurred on November 4, 1952, when voters approved slight grammatical changes and the addition of a clause noting that school districts, with voter assent, can become indebted above the debt limit. *Compare* WASH. CONST. art. VIII, § 6 (repealed 1952), *with* WASH. CONST. art. VIII, § 6. *See also* EARL COE, SEC'Y OF STATE, A PAMPHLET 20 (1952) (voter pamphlet for the general election to be held on Tuesday, November 4, 1952).

46. WASH. CONST. art. VIII, § 1 (amended 1972).

47. A. LUDLOW KRAMER, SEC'Y OF STATE, OFFICIAL VOTERS PAMPHLET 50–51 (1972) (voter pamphlet for the general election to be held on Tuesday, November 7, 1972).

48. *Dep't of Ecology v. State Fin. Comm.*, 116 Wash. 2d 246, 257, 804 P.2d 1241, 1246 (1991) (plurality opinion).

49. The 1999 amendment allowed the state to guaranty voter-approved, general-obligation debt of the school district without having the guaranty count as state debt. SEC'Y OF STATE, STATE OF



The current version provides:

The aggregate debt contracted by the state, as calculated by the treasurer at the time debt is contracted, shall not exceed that amount for which payments of principal and interest in any fiscal year would require the state to expend more than the applicable percentage limit of the arithmetic mean of its general state revenues for the six immediately preceding fiscal years . . . .<sup>50</sup>

There are three main differences between the state and municipal debt limitations. First, the provisions calculate the limit differently. The state limit is a percentage of general revenues over multiple years while the municipal limit is a percentage of the recently assessed value of taxable property.<sup>51</sup> Second, each section has a different method for determining whether the limit has been reached. The amount of debt the state can incur is based on how much debt service must be paid annually (regardless of the state's total obligations); in contrast, the municipality restriction focuses on the total amount of debt (without regard to annual payment obligations).<sup>52</sup> Third, the state-debt provision precisely defines "debt," while the municipal provision does not.<sup>53</sup>

#### *B. Triggering Article VIII Limits*

Because *Wenatchee Events Center* purported to change the article VIII analysis, a critical examination of the opinion requires an understanding of how the Court previously interpreted the debt limits—in particular, what triggered the limits and how contingent liabilities and guaranties<sup>54</sup> were treated.

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WASHINGTON VOTERS PAMPHLET 8–9 (1999) (voter pamphlet for the general election to be held on Tuesday, November 2, 1999). The 2012 amendment changed the formula for calculating how much debt the state may incur. KING CNTY., OFFICIAL LOCAL VOTERS' PAMPHLET 32–33 (2012) (voter pamphlet for the general and special election to be held on Tuesday, November 6, 2012).

50. WASH. CONST. art. VIII, § 1(b).

51. Compare WASH. CONST. art. VIII, § 1(b), with WASH. CONST. art. VIII, § 6.

52. Compare WASH. CONST. art. VIII, § 1(b), with WASH. CONST. art. VIII, § 6.

53. Compare WASH. CONST. art. VIII, § 1(d), with WASH. CONST. art. VIII, § 6.

54. The words "guarantee" and "guaranty" are interchangeable. See BLACK'S LAW DICTIONARY 773 (9th ed. 2009); For clarity, this Essay uses "guaranty" (and the plural "guaranties") throughout because it is favored in *Wenatchee Events Center*, see generally *Wenatchee Events Center*, 175 Wash. 2d 788, 287 P.3d 567 (2012) (plurality opinion), and is the version more commonly used in financial contexts, BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 399 (3d ed. 2011).

1. *Before Wenatchee Events Center, Section 1 and Section 6 Were Triggered by the Same Types of Obligations*

Before *Wenatchee Events Center*, the Court did not recognize a difference between the types of obligations that would trigger the limits established in section 1 and section 6.<sup>55</sup> Both sections were interpreted synonymously<sup>56</sup> despite different operative phrases—section 1 uses “[t]he aggregate *debt* contracted by the state” and section 6 employs “*indebted* in any manner.”<sup>57</sup> The Court indicated that “*debt*” and “*indebtedness*” were interchangeable by (1) using municipal cases to define “*debt*”,<sup>58</sup> (2) applying the same principles to both sections<sup>59</sup> while interchangeably citing cases relating to each section,<sup>60</sup> and (3) relying on municipal debt cases to explain how the state-debt limit is calculated.<sup>61</sup> Based on this shared understanding of the two provisions, the Court used the term “*debt*” to refer to an obligation that implicates the article VIII limit of a state or a municipality.

The Court also defined what constituted debt: borrowed money that the state or municipality was required to pay with proceeds of general tax levies.<sup>62</sup> In *State ex rel. Washington State Finance Committee v.*

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55. While the lead opinion in *Wenatchee Events Center* does not treat these two provisions identically, this Essay argues in Part II.B, *infra*, that treating the provisions differently is an error.

56. See *State ex rel. Winston v. Rogers*, 21 Wash. 206, 208, 57 P. 801, 802 (1899) (“Section 6 of the same article (8) of the constitution limits municipal indebtedness, and should receive the same construction as section 1 relative to state indebtedness.”); UTTER & SPITZER, *supra* note 36, at 161 (explaining section 6’s limitation by stating “[a]s with state obligations, debt is defined as borrowed money payable from taxes”).

57. WASH. CONST. art. VIII, §§ 1(b), 6 (emphasis added).

58. *E.g.*, *State ex rel. Wittler v. Yelle*, 65 Wash. 2d 660, 669, 399 P.2d 319, 324–25 (1965) (explaining the meaning of state debt by citing two municipal cases: *Winston v. City of Spokane*, 12 Wash. 524, 41 P. 888 (1895), and *Comfort v. City of Tacoma*, 142 Wash. 249, 252 P. 929 (1927)).

59. See, *e.g.*, *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 661, 384 P.2d 833, 841–42 (1963) (recognizing the applicability of the special-fund doctrine in the state-debt context); *City of Spokane*, 12 Wash. at 526, 41 P. at 889 (applying the special-fund doctrine in the municipal-debt context).

60. See, *e.g.*, *State ex rel. Attorney Gen. v. McGraw*, 13 Wash. 311, 318–19, 43 P. 176, 178 (1895) (applying the special-fund doctrine to state debt and citing *City of Spokane*—a municipal-debt case). While the Court sometimes declines to apply a case from another section, the Court has justified those decisions by distinguishing between the financial agreements rather than the sections addressed in the cases. See, *e.g.*, *Martin*, 62 Wash. 2d at 659–60, 384 P.2d at 841–42 (addressing section 1 and distinguishing *Comfort* and *City of Spokane* without relying on the fact that those cases addressed section 6).

61. *Rogers*, 21 Wash. at 208–09, 57 P. at 802.

62. UTTER & SPITZER, *supra* note 36, at 154, 161. For example, the government incurs debt when bonds are issued that will be repaid from a tax on cigarettes because the government is (1) borrowing funds from the bond purchasers and (2) repaying those bonds from a generally

*Martin*<sup>63</sup> the Court wrote that “a debt of the State of Washington” is “[a]ny obligation which must in law be paid from any taxes levied generally.”<sup>64</sup> This opinion was supplemented two years later in *State ex rel. Wittler v. Yelle*<sup>65</sup> when the Court stated that it “has many times said what Article 8 means by the word ‘debt.’ . . . [I]t means borrowed money.”<sup>66</sup> While section 1 was later amended to reflect this understanding,<sup>67</sup> the definition continues to resonate for section 6 as well; Justice Utter—the late Washington State Supreme Court Justice<sup>68</sup>—and Professor Hugh Spitzer—a Washington State Constitution scholar and public-finance lawyer<sup>69</sup>—embrace this definition in their treatise on the Washington State Constitution.<sup>70</sup>

## 2. *Before Wenatchee Events Center, Guaranties Constituted Debt While Contingent Obligations Were Not Treated as Debt*

With this definition of debt providing a framework for article VIII analysis, the Court addressed guaranties and CLAs. A guaranty is a promise to answer for the debt of another if the debtor fails to make a payment.<sup>71</sup> Such an agreement is a narrower form of a CLA, which is the promise to answer for another’s obligation upon the occurrence (or non-occurrence) of a specific event.<sup>72</sup> Although guaranties and CLAs are closely related, the Court developed conflicting case law about these types of agreements under article VIII. The Court concluded in *State Capitol Commission v. State Board of Finance*<sup>73</sup> that a guaranty created debt even though the State was not primarily liable.<sup>74</sup> Conversely, the

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applicable tax—an excise tax on cigarette sales. *Martin*, 62 Wash. 2d at 662, 384 P.2d at 843–44.

63. 62 Wash. 2d 645, 384 P.2d 833 (1963).

64. *Id.* at 661, 384 P.2d at 843.

65. 65 Wash. 2d 660, 399 P.2d 319 (1965).

66. *Id.* at 668, 399 P.2d at 324. *Wittler* also reviewed previous cases and found that borrowed money was involved in every case where article VIII applied. *Id.* at 669–70, 399 P.2d at 324–25.

67. Compare WASH. CONST. art. VIII, § 1(d) (defining debt as “borrowed money”), with WASH. CONST. art. VIII, § 1 (amended 1972) (omitting definition).

68. Justice Robert Utter Profile, GALLAGHER L. LIBR., <https://lib.law.washington.edu/content/memorial/justiceutter> (last visited April 10, 2015).

69. See Hugh D. Spitzer, *Curriculum Vitae*, <http://www.law.washington.edu/directory/CV/SpitzerHugh.pdf> (last visited April 11, 2015).

70. See UTTER & SPITZER, *supra* note 36, at 161.

71. *Wilson Court Ltd. P’ship v. Tony Maroni’s Inc.*, 134 Wash. 2d 692, 707, 952 P.2d 590, 598 (1998).

72. See KOEGEN, *supra* note 1, at 522.

73. 74 Wash. 15, 132 P. 861 (1913).

74. *Id.* at 26–27, 132 P. at 865.

Court held in *Comfort* and *Kelly v. City of Sunnyside*<sup>75</sup> that a contingent obligation to pay was not debt because the government was not primarily liable and the likelihood of any liability was speculative.<sup>76</sup> The conflict between these lines of cases was the central issue in *Wenatchee Events Center*.

In *State Capitol Commission*, the Court established that a guaranty of bonds is debt because the state's general credit had been pledged for repayment.<sup>77</sup> The Court developed this doctrine while evaluating the state's guaranty of bonds that were secured by the capitol-building fund.<sup>78</sup> The Court concluded that these bonds, because of the guaranty, were general obligations of the state and were article VIII debt in accord with "the spirit and the letter" of the Constitution.<sup>79</sup> The Court reached this conclusion even after acknowledging that taxpayers likely would not be obligated to make any payments because the value of the land securing the bonds exceeded the amount of the bonds.<sup>80</sup> The mere possibility that the state would have to use general revenues to pay for these bonds, however unlikely, was sufficient to establish that the guaranty of the obligation was article VIII debt.<sup>81</sup>

In *Comfort*, the Court recognized the contingent-liability doctrine without discussing the apparent conflict with *State Capitol Commission*'s treatment of guaranties.<sup>82</sup> The contingent-liability doctrine provides that no article VIII debt is incurred when the government is not primarily liable but is obligated to pay if some event occurs that is outside the control of the party securing the debt.<sup>83</sup> Thus, an agreement pledging the government fisc to repayment of another's debt is not

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75. 168 Wash. 95, 11 P.2d 230 (1932).

76. *See id.* at 97, 11 P.2d at 231; *Comfort v. City of Tacoma*, 142 Wash. 249, 255, 252 P. 929, 931 (1927).

77. *See State Capitol Comm'n*, 74 Wash. at 26–27, 132 P. at 865. *Wenatchee Events Center* asserts that this conclusion was reaffirmed in *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 654–55, 384 P.2d 833, 839 (1963), 175 Wash. 2d 788, 801, 287 P.3d 567, 574 (2012) (plurality opinion), but *Martin* did not affirm *State Capitol Comm'n* and instead discussed the case while surveying earlier cases. *See Martin*, 62 Wash. 2d at 654–56, 384 P.2d at 839–40.

78. *State Capitol Comm'n*, 74 Wash. at 18, 132 P. at 862.

79. *Id.* at 27, 132 P. at 865.

80. *Id.*

81. *See id.*

82. *See Comfort v. City of Tacoma*, 142 Wash. 249, 255, 252 P. 929, 931 (1927). This decision reflected the approaches taken in other states. *See id.* at 256–57, 252 P. at 931 (discussing how other jurisdictions treat contingent liabilities); 15 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 41.22 (3d ed., rev. vol. 2005) (collecting cases from different jurisdictions for the assertion that contingent liabilities do not create indebtedness).

83. *See Comfort*, 142 Wash. at 255, 252 P. at 931.

article VIII debt when the obligation to make payments is not realized until the borrowing entity defaults.<sup>84</sup>

In *Comfort*, the city of Tacoma had established a fund—replenished in certain circumstances by a special-tax levy—that would ensure local-improvement bonds were paid.<sup>85</sup> If the city paid a bond using the fund, the City would be subrogated to the rights of the bondholder.<sup>86</sup> However, there were significant limitations on the fund and its use. First, the fund's value could not exceed five percent of the outstanding improvement bonds secured by the fund.<sup>87</sup> Second, the City was obligated to pay into the fund and purchase bonds only if the regular assessments were insufficient.<sup>88</sup> Third, bondholders had no recourse against Tacoma's general revenue—the bondholders could only sue for repayment from the local-improvement-bond assessment or the fund created by Tacoma.<sup>89</sup>

In evaluating whether the agreement constituted debt, the Court focused on the last two limitations and concluded that Tacoma's obligation was not article VIII debt because it was “only a contingent liability as far as the city is concerned, and in no sense a debt proper.”<sup>90</sup> It was not a debt because the bondholders had no unconditional right to receive money from Tacoma.<sup>91</sup> The city incurred an obligation only if the regular assessments were insufficient and the bondholders sought repayment from the guaranty fund created by the city.<sup>92</sup> The Court explained:

If A. is indebted to B., and C. promises that, if A. does not pay B., then he (C.) will, no one would contend that C. had an outstanding debt. He has but a contingent liability that may or may not ripen into a debt. If A. fails to pay, then, in that event, the contingent liability has ripened, and the debt is absolute as to C. But until that time arrives C. owes B. nothing. So in the present case, the city will have nothing to pay if the property holders meet their obligations and pay their assessments. If they fail to do so, then the city will pay into the fund to the extent

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84. *See id.* at 255–56, 252 P. at 931.

85. *Id.* at 254, 252 P. at 929–30.

86. *Id.*

87. *Id.* at 254–55, 252 P. at 930–31.

88. *Id.* at 255, 252 P. at 931.

89. *Id.* at 254–55, 252 P. at 930–31.

90. *Id.* at 255, 252 P. at 931.

91. *See id.*

92. *See id.*

outlined in the statute.<sup>93</sup>

Accordingly, the Court held a contingent liability is not debt because the obligation has not actually become a liability but merely gives rise to the potential that a liability may be incurred.<sup>94</sup>

In 1932, *Kelly* reaffirmed *Comfort* but again the Court did not address the conflict with *State Capitol Commission*.<sup>95</sup> In *Kelly*, the Court clarified the contingent-liability doctrine by responding to the appellant's argument that *Austin v. City of Seattle*<sup>96</sup> controlled.<sup>97</sup> The Court explained that *Austin* was distinguishable because the city was primarily liable in that case rather than contingently liable.<sup>98</sup> Like *Comfort*, *Kelly* focused on whether the treasury was directly and immediately at risk rather than whether there might ultimately be such a risk.<sup>99</sup> The decision in *Kelly* helped further delineate the doctrine by emphasizing that contingent liability is the opposite of primary liability.<sup>100</sup> In sum, the Court used *Comfort* and *Kelly* to establish that a contingent liability—an obligation that may be incurred—is not article VIII debt.<sup>101</sup>

Before *Wenatchee Events Center*, the Court had two lines of cases dealing with the calculation of debt in situations where the government is not primarily liable: *Comfort/Kelly* and *State Capitol Commission*. In the first line—*Comfort* and *Kelly*—the Court held such obligations are not debt because they are merely contingent liabilities. The Court determined that the agreements were not debt by focusing on the fact that the municipality may not be required to make a payment. In the second line—*State Capitol Commission*—the Court concluded potential obligations are debt because they are a guaranty. The Court honed in on the fact that the treasury ultimately would be responsible for payment if the primary debtor was unable to pay. In sum, the Court had two lines of cases dealing with potential obligations—a conflict that posed the

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93. *Id.* at 255–56, 252 P. at 931.

94. *See id.*

95. *See Kelly v. City of Sunnyside*, 168 Wash. 95, 96–97, 11 P.2d 230, 231 (1932).

96. 2 Wash. 667, 27 P. 557 (1891).

97. *Kelly*, 168 Wash. at 97, 11 P.2d at 231.

98. *Id.* In *Austin*, the Court concluded a debt was created when a city charter provision made the city primarily liable for all improvement bonds—whereas in *Kelly*, the city only had contingent liability. *Id.*

99. *See Comfort*, 142 Wash. at 255, 252 P. at 931 (focusing on whether the municipality was primarily liable instead of whether it might become liable in the future); *Kelly*, 168 Wash. at 96–97, 11 P.2d at 231 (relying on *Comfort*).

100. *See Kelly*, 168 Wash. at 97, 11 P.2d at 231.

101. UTTER & SPITZER, *supra* note 36, at 161.

central issue in *Wenatchee Events Center*.

C. *Wenatchee Events Center Calls into Question the Continued Viability of the Contingent-Liability Doctrine by Recasting the Analysis Used to Determine Debt*

In *Wenatchee Events Center*, the lead opinion attempted to resolve the conflict between *State Capitol Commission* and *Comfort* to answer whether the proposed CLA between the City and the District constituted article VIII debt for the City.<sup>102</sup> The plurality addressed the conflict by re-characterizing prior cases as establishing the risk-of-loss principle<sup>103</sup> and then using that principle to establish *State Capitol Commission* as the correct statement of the law.<sup>104</sup> But at the same time, the opinion also appeared to reaffirm *Comfort*<sup>105</sup> and decide that the CLA was debt because it was a guaranty rather than a contingent obligation like the agreement in *Comfort*.<sup>106</sup>

1. *The Superior Court Treated the CLA as Debt*

At the superior court, the issue in *Wenatchee Events Center* was whether the proposed CLA<sup>107</sup> between the City and the District constituted article VIII debt.<sup>108</sup> The City and the District negotiated the CLA to help the District secure affordable financing for bonds.<sup>109</sup> Those bonds would pay off the short-term bond anticipation notes that financed the construction of the Regional Events Center.<sup>110</sup> The CLA would have obligated the City to loan the District money only if the District lacked

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102. See *Wenatchee Events Center*, 175 Wash. 2d 788, 799–801, 287 P.3d 567, 574 (2012) (plurality opinion).

103. *Id.* at 797–98, 287 P.3d at 572–73.

104. *Id.* at 801–02, 287 P.3d at 574.

105. See *id.*

106. See *id.* at 803–04, 287 P.3d at 575.

107. Although the final agreement was called an interlocal agreement, Wenatchee City Council Res. No. 2011-52, at exhibit A (July 14, 2011) (enacted) [hereinafter CLA Terms], available at <http://www.wenatcheewa.gov/Modules/ShowDocument.aspx?documentid=5657>, this is just a broad term for a contract between two or more public entities. WASH. REV. CODE § 39.34.080 (2014). The resolution approving the agreement, drafts of the agreement, and the Court were more specific—each identified the type of contract at issue: a contingent-loan agreement—a form of a CLA. CLA Terms, *supra*, at 1; WENACHEE CITY COUNCIL, COUNCIL PACKET (June 30, 2011), available at <http://www.wenatcheewa.gov/Modules/ShowDocument.aspx?documentid=5547>; *Wenatchee Events Center*, 175 Wash. 2d at 791, 287 P.3d at 569.

108. *Wenatchee Events Center*, 175 Wash. 2d at 791, 287 P.3d at 569.

109. See CLA Terms, *supra* note 107, at 1–2.

110. See *id.*

sufficient funds to pay the principal and interest on the new bonds.<sup>111</sup> This obligation was not limited to the City's debt limit: The City had an unconditional obligation to lend the District as much money as was required to service the bonds.<sup>112</sup> But the District did not have to apply the loans to servicing the bonds; the City could direct that its loan be used only for operation costs of the Regional Events Center.<sup>113</sup> Furthermore, the City could fund these loans however it saw fit; the loans did not have to be funded by levying taxes or borrowing money.<sup>114</sup>

The CLA also limited the City's potential liability from bondholder suits as well as insulating the City against the risk that the District would be unable to repay the loans because it was insolvent. The CLA provided that "[a]ll liabilities incurred by the District, including but not limited to the [b]onds, are obligations solely of the District and shall not be liabilities or obligations of the City."<sup>115</sup> Furthermore, bondholders would have no recourse against the City.<sup>116</sup> The CLA included numerous provisions to ensure the City was repaid. First, the District's obligation to repay the loans was absolute and unconditional—the District pledged its full faith, credit, and resources towards repayment.<sup>117</sup> Second, if the District lacked sufficient debt capacity, then any loan constituted an equity payment for an interest in the Regional Events Center.<sup>118</sup> Third, the City could force the District to call bonds for redemption, levy a tax, or put a proposition on the ballot to increase taxes.<sup>119</sup>

On June 30, 2011, the Wenatchee City Council passed a resolution approving the CLA on the condition that the City obtain a judicial declaration that the City had authority to enter the agreement without voter assent.<sup>120</sup> The City filed a complaint in Superior Court seeking a declaratory judgment on whether the CLA would cause the City to exceed its debt limit—effectively, the City asked whether the CLA constituted article VIII debt and, if so, to what extent.<sup>121</sup> The Superior

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111. *Id.*

112. *See id.* at 2–3.

113. *Id.* at 3.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 5.

118. *Id.*

119. *Id.* at 6–7.

120. *Id.* (resolution attached to terms).

121. *See Wenatchee Events Center*, 175 Wash. 2d 788, 794, 287 P.3d 567, 570 (2012) (plurality opinion).



Court concluded that the entire amount secured by the CLA would constitute debt under article VIII.<sup>122</sup> Following an appeal, the Court took the case on direct review.<sup>123</sup>

2. *The Court Concluded the CLA Was Debt After Adopting a New Framework that Rejected the Contingent-Liability Doctrine*

The lead opinion affirmed the trial court's decision<sup>124</sup> after re-characterizing prior cases to establish that the risk-of-loss principle guides the analysis under article VIII and makes contingent liabilities debt under section 6.<sup>125</sup> But after concluding that contingent liabilities are debt, the lead opinion stated that the obligation at the center of the case was debt based on the fact that the agreement was actually a guaranty.<sup>126</sup>

a. *The Lead Opinion Re-Characterized Prior Cases to Establish that the Risk-of-Loss Principle Determines When Debt Is Created*

The lead opinion used the risk-of-loss principle to guide the analysis of what constitutes debt. According to this principle, courts determine whether there is debt by focusing on who—the taxpayers or the creditors—would lose money if the primary debtor is unable to pay<sup>127</sup> without considering the likelihood of such an occurrence or the amount at risk.<sup>128</sup> Specifically, there is article VIII debt when taxpayers could be required to make a payment on a debt obligation because the risk of loss is deemed to fall on taxpayers rather than creditors.<sup>129</sup> The plurality justified applying this principle by concluding that the principle underlies many of the various analyses the Court has used when evaluating article VIII.<sup>130</sup> In support of this conclusion, the lead opinion noted that Robert Amdursky and Clayton Gillette<sup>131</sup> previously had

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122. *Id.* at 794, 287 P.3d at 570.

123. *Id.*

124. *Id.* at 792, 287 P.3d at 569.

125. *See id.* at 801, 287 P.3d at 574.

126. *See id.* at 803, 287 P.3d at 575.

127. *See id.* at 797, 287 P.3d at 572.

128. *Id.* at 798, 287 P.3d at 573.

129. *See id.* at 797, 287 P.3d at 572.

130. *Id.* The lead opinion, however, only addressed the principles explanatory power for three of the Court's doctrines: guaranties, special funds, and lease-purchase agreements. *Id.* at 797–98, 287 P.3d at 572–73.

131. This Essay will refer to “Amdursky and Gillette” as “Gillette” when discussing their work because Gillette was the author responsible for the portions of their book that are referenced in this

characterized Washington cases in this manner in their book on municipal debt.<sup>132</sup>

The plurality rationalized its use of the risk-of-loss principle by re-characterizing earlier cases and concluding that the principle explained the cases' results.<sup>133</sup> Because the Court had not explicitly or formally adopted this analysis in earlier cases,<sup>134</sup> the plurality was "forced to craft this test through inference."<sup>135</sup> The lead opinion developed this rule by focusing on the facts and conclusions of each case but without discussing the analysis in them.<sup>136</sup> For example, the opinion highlighted how the facts and opposite conclusions in *State ex rel. Winston v. City of Spokane*<sup>137</sup> and *Martin*—relatively similar cases involving construction bonds that reached different results on whether the obligations constituted debt—illustrate the point that the risk-of-loss principle explains earlier cases.<sup>138</sup> The plurality also contended the Court had begun explicitly relying on this principle.<sup>139</sup> The opinion focused on *Department of Ecology*'s plurality opinion, which held there was no debt

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Essay. E-mail from Clayton P. Gillette, Professor of Law, New York University School of Law, to Hugh Spitzer, Professor of Law, University of Washington School of Law (May 19, 2013, 14:31 EST) (on file with author). Clayton Gillette is a Professor of Law at New York University School of Law who focuses on, among other things, local-government law. *Clayton Gillette*, N.Y.U., <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=19945>.

132. *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572 (discussing AMDURSKY & GILLETTE, *supra* note 38, § 4.1.2, at 164–70). Gillette's work is discussed further in Part II.C.1.c.

133. *See Wenatchee Events Center*, 175 Wash. 2d at 797–98, 287 P.3d at 572–73.

134. *See id.* at 819, 287 P.3d at 582 (Fairhurst, J., dissenting); AMDURSKY & GILLETTE, *supra* note 38, § 4.1.2, at 169 (stating that "the mechanisms devised to avoid debt limits have not readily been analyzed by reference to the standard of ultimate exposure of the public treasury").

135. *Wenatchee Events Center*, 175 Wash. 2d at 819, 287 P.3d at 582 (Fairhurst, J., dissenting). Even the plurality appears to concede the principle has not been definitively established as the law. *See id.* at 798 n.9, 287 P.3d at 572 n.9 (plurality opinion) (asserting it is important to state the principle directly because there is a pattern of courts relying on the principle).

136. *See id.* at 797–98, 287 P.3d at 572–73.

137. 12 Wash. 524, 41 P. 888 (1895).

138. *Wenatchee Events Center*, 175 Wash. 2d at 797–98, 287 P.3d at 572. The lead opinion asserted there was article VIII debt in *Martin* because if the state was unable to repay the bonds then the state would raise the excise tax, therefore, putting the risk of a shortfall on the taxpayers. *Id.* at 797, 287 P.3d at 572. In contrast, *Wenatchee Events Center* highlighted that the bonds in *City of Spokane* were not debt because the bonds were payable only from the project's revenue—thus, the taxpayers bore no risk. *Id.* at 797–98, 287 P.3d at 572. But this reframing of cases is problematic; *Martin*, in particular, did not address who bore the risk of loss and instead relied on reaffirming the earlier principle that debt is an obligation payable from taxes. *See generally State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

139. *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572. The lead opinion omitted that *Department of Ecology* was a plurality—a majority agreed in the result but only three justices signed the opinion that *Wenatchee Events Center* quotes for the risk-of-loss principle. *See generally Dep't of Ecology v. State Fin. Comm.*, 116 Wash. 2d 246, 804 P.2d 1241 (1991) (plurality opinion).

because “[t]he ultimate risk of loss is not on the State’s future taxpayers. Instead, the risk of loss is on the [investors], who will have entered into the transaction with full knowledge that they alone bear that risk.”<sup>140</sup> Having re-characterized the Court’s previous cases to establish the risk-of-loss principle, the plurality in *Wenatchee Events Center* turned to the contingency and guaranty cases.

*b. The Lead Opinion Applied the Risk-of-Loss Principle to Resolve the Conflict Between the Guaranty and Contingent Liability Cases*

*Wenatchee Events Center*’s lead opinion addressed the conflict between the contingent-liability cases and the guaranty case—ultimately concluding that *State Capitol Commission*’s treatment of guaranties as debt is the correct statement of law.<sup>141</sup> The plurality discussed three types of contingent liabilities: (1) pay-as-you-go agreement—the obligation to pay depends on receiving goods; (2) limited-contingent liability—the potential obligation is less than the entire debt; and (3) unlimited-contingent liability—the potential obligation is equal to the entire debt.<sup>142</sup> The lead opinion concluded that a pay-as-you-go arrangement is not debt and then turned to the remaining types of contingent liabilities.<sup>143</sup>

The lead opinion drew a distinction between limited- and unlimited-contingent liabilities by suggesting that *Comfort* correctly stated the law but that the case’s dicta was too broad.<sup>144</sup> Specifically, the opinion stated that *Comfort* may have correctly held that limited-contingent obligations are not debt but reached too far by stating that unlimited-contingent obligations—which *Wenatchee Events Center*’s plurality deems absolute guaranties—are not debt.<sup>145</sup> This latter conclusion in *Comfort* the plurality deemed dicta and directly contradicted by *State Capitol Commission*’s treatment of guaranties.<sup>146</sup>

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140. *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572–73 (alteration in original) (quoting *Dep’t of Ecology*, 116 Wash. 2d at 254–55, 804 P.2d at 1245).

141. *See id.* at 799, 801–02, 287 P.3d at 573–74.

142. *See id.* at 799–801, 287 P.3d at 573–74.

143. *Id.* at 799–800, 287 P.3d at 573.

144. *See id.* at 801–02, 287 P.3d at 574.

145. *See id.* at 802, 287 P.3d at 574.

146. *Id.* at 800–01, 287 P.3d at 573–74. It is debatable whether this portion of *Comfort* is dicta because the language appears directly related and necessary to resolving the case’s central issue. *Id.* at 816, 287 P.3d at 581 (Fairhurst, J. dissenting). Furthermore, the plurality’s assertion that *Comfort* discussed two types of contingent liabilities—one in holding and one in dicta—is questionable because *Comfort* focused on whether the obligation was currently owed or whether it was conditioned on some future event—there was no indication that the limited size of the obligation

The plurality resolved this conflict by applying the risk-of-loss principle.<sup>147</sup> The lead opinion explained that *State Capitol Commission* was correct and *Comfort*'s dicta was incorrect because the risk of loss for a contingent liability falls on the municipality: "Even if the municipality's liability is contingent upon the failure of payment by an intervening agency such as the District, such a contingent liability is subject to the debt limit if the ultimate risk of loss falls upon the municipality."<sup>148</sup> Although the lead opinion asserted its holding was limited to *Comfort*'s purported dicta, the analysis speaks broadly of contingent liabilities and the holding's justification—whether the taxpayer bears risk—is equally applicable to both limited- and unlimited-contingent liabilities.<sup>149</sup> Thus, the lead opinion nominally treats only unlimited-contingent liabilities as debt but appears in practice to be overruling all of *Comfort*'s contingent-liability doctrine and treating all contingent obligations as debt.

c. *The Lead Opinion Held that the Entire Value of the CLA Was Debt Because the Agreement was a Guaranty of the District's Bonds*

Despite focusing on contingent liabilities for much of the opinion, the lead opinion pivoted to conclude that the CLA was article VIII debt because the CLA was a guaranty.<sup>150</sup> The plurality explained the substance of the agreement had the City acting as a traditional guarantor by pledging to provide credit security to make the bonds more marketable.<sup>151</sup> Accordingly, the lead opinion treated the CLA as debt because the CLA mirrored the situation in *State Capitol Commission*: a public entity obligating itself to pay if the primarily liable party was unable to make payments.<sup>152</sup>

In sum, Washington's constitutional-debt limits were at the center of

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was a factor. See *Comfort v. City of Tacoma*, 142 Wash. 249, 255–258, 252 P. 929, 931–32 (1927); see also *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 659–60, 384 P.2d 833, 841 (1963) (explaining that the reason for *Comfort*'s holding was that the obligations were not the city's debt).

147. See *Wenatchee Events Center*, 175 Wash. 2d at 801, 287 P.3d at 574.

148. *Id.*

149. See *id.* at 801–02, 287 P.3d at 574. Reading the lead opinion as applying to all of *Comfort* is further justified based on the lead opinion's unpersuasive dissection of *Comfort* into holding (limited-contingent liabilities) and dicta (unlimited-contingent liabilities). See *supra* note 146.

150. *Wenatchee Events Center*, 175 Wash. 2d at 803, 287 P.3d at 575.

151. *Id.* at 803, 287 P.3d at 575.

152. See *id.*

*Wenatchee Events Center*. The Court was asked to reconcile existing case law on guaranties and contingent liabilities. The lead opinion resolved this conflict by developing an overarching framework for debt cases—the risk-of-loss principle—and applying that standard to reject only part of the contingent-liability doctrine. But the opinion’s precise holding is unclear because the analysis seems to strike down the entire contingent-liability doctrine while also discarding any conclusions about the doctrine in favor of treating the agreement as a guaranty. Thus, *Wenatchee Events Center* leaves significant questions about the fate and scope of the contingent-liability doctrine.

## II. THE COURT SHOULD REVISIT *WENATCHEE EVENTS CENTER*

This Essay argues the Court should act promptly to address the unsettled state of the law following *Wenatchee Events Center* because the lead opinion fails to offer clear guidance, has a broader than intended scope, and presents an incorrect framework—the risk-of-loss principle—for evaluating debt. Because Washington law does not support this principle, this Essay proposes the Court not follow *Wenatchee Events Center*’s approach that treats all contingent liabilities as debt and suggests treating as debt only those portions of contingent liabilities that appear likely to require payment.

### A. *Wenatchee Events Center Does Not Offer Clear Guidance to Municipalities or Future Courts*

The lead opinion’s failure to garner a majority and its unclear treatment of contingent liabilities will make it difficult for municipalities to assess their debt and for future courts to evaluate debt cases. As an initial matter, the absence of a majority opinion minimizes the lead opinion’s usefulness. Because *Wenatchee Events Center* is a plurality, the opinion “has limited precedential value and is not binding on the courts”;<sup>153</sup> thus, it is unclear whether the risk-of-loss principle will be applied in future cases and how courts will view the lead opinion’s treatment of contingent liabilities.

Moreover, the lead opinion’s inconsistent treatment of contingent liabilities also leaves courts and municipalities without clear guidance. While *Wenatchee Events Center* appeared to reject the contingent-liability doctrine, the lead opinion obfuscated this message in two ways.

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153. *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004).

First, the opinion suggested *Comfort* was correctly decided<sup>154</sup> even though the risk-of-loss principle would seem to require overruling the case.<sup>155</sup> Specifically, the lead opinion indicated that *Comfort* correctly held that limited-contingent obligations are not debt but did not reconcile that conclusion with the fact that a municipality entering such an agreement still bears some risk.<sup>156</sup> Second, the opinion resolved the case by holding the CLA was debt because it was a guaranty rather than a contingent liability.<sup>157</sup>

In sum, there is no binding precedent and the existing precedent is far from clear on how article VIII should be (or will be) treated in the future.

*B. The Lead Opinion Unpersuasively Attempted to Limit Wenatchee Events Center's Scope by Distinguishing Between Debt and Indebtedness*

The plurality's attempt to confine the effect of the opinion to only municipal government debt by distinguishing between debt and indebtedness is unpersuasive.<sup>158</sup> The basis for this position is not only at odds with the Court's precedent but also lacks support in both the Constitution's text and principles of constitutional interpretation. As a result, *Wenatchee Events Center's* lead opinion has a more expansive scope than intended; the opinion puts both municipal *and* state financing schemes at risk—or at least significantly affects the market and costs for their bonds while uncertainty lingers about the plurality opinion.<sup>159</sup>

The lead opinion justified its holding in part by explaining that section 6's language limiting the ability of a municipality to become indebted in any manner is broader than section 1's limitation on state debt.<sup>160</sup> But no authority was cited for this proposition nor was the conclusion justified with analysis.<sup>161</sup> Basing such an important distinction on an unsupported assertion means that future courts and

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154. *Wenatchee Events Center*, 175 Wash. 2d at 802, 287 P.3d at 574.

155. *See id.* at 801, 287 P.3d at 574 (explaining that a contingent liability is debt whenever taxpayers could ultimately be required to make a payment).

156. *See id.* at 801–02, 287 P.3d at 574. The lead opinion does not explain why or how *Comfort's* limited-contingent liability renders that agreement not debt or how courts in the future should determine what percentage is acceptable in a CLA before it becomes debt.

157. *Id.* at 803, 287 P.3d at 575.

158. *See id.* at 807, 287 P.3d at 577 (stating that section 6 is broader than section 1).

159. *See* Brief of Amicus Curiae, *supra* note 3, at 7.

160. *Wenatchee Events Center*, 175 Wash. 2d at 807, 287 P.3d at 577.

161. *See id.*

policy makers will have to hypothesize as to the reasoning. Accordingly, this Essay presents, discusses, and ultimately rejects two potential justifications—based on the text of each provision—that might support the distinction. The Essay then turns to traditional principles of constitutional interpretation to bolster the conclusion that there is no difference between “debt” and “indebtedness”—which is the position the Court embraced prior to *Wenatchee Events Center*.<sup>162</sup> Accordingly, the holding in *Wenatchee Events Center* is applicable to both state and municipal financing despite the lead opinion’s attempt at minimizing the opinion’s scope.

1. “Debt” is Not a Term of Art that Is Narrower than “Indebtedness”

The plurality could be asserting that “debt” is a term of art while “indebted in any manner” is not.<sup>163</sup> This has some facial appeal because article VIII, section 1(d) has a relatively detailed definition of “debt.”<sup>164</sup> If “debt” is a term of art, then the corresponding failure to define “indebtedness” could indicate that the provisions are addressing different types of obligations.<sup>165</sup> To understand the meaning of section 1’s definition of “debt,” it is helpful to look at the origins of the definition.<sup>166</sup> The drafters of the 1972 amendment defining debt merely enshrined the definition established in previous cases.<sup>167</sup> These cases and the Court’s other opinions addressing debt limitations did not distinguish between debt and indebtedness; the Court often mixed and matched cases dealing with either section while applying the same analytical frameworks.<sup>168</sup> Up until *Wenatchee Events Center*, no distinction was

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162. *Supra* Part I.B.1.

163. *See Wenatchee Events Center*, 175 Wash. 2d at 807, 287 P.3d at 577 (distinguishing section 1 from section 6 on the basis that the language in section 6 is broader).

164. *See* WASH. CONST. art. VIII, § 1(d).

165. *Cf. State v. Kintz*, 169 Wash. 2d 537, 549–50, 238 P.3d 470, 477 (2010) (explaining the importance attached to omissions when doing statutory interpretation).

166. *See* Wash. Water Jet Workers Ass’n v. Yarbrough, 151 Wash. 2d 470, 477, 90 P.3d 42, 46 (2004) (noting that the Court may examine the historical context of a constitutional provision for guidance).

167. *Compare* WASH. CONST. art. VIII, § 1(d) (defining debt as “borrowed money” that must be “repaid . . . from general state revenues”), *with* State *ex rel.* Wittler v. Yelle, 65 Wash. 2d 660, 668, 399 P.2d 319, 324 (1965) (noting that the Court has repeatedly said debt means “borrowed money”), State *ex rel.* Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 661, 384 P.2d 833, 843 (1963) (noting “[a]ny obligation which must in law be paid from any taxes levied generally is . . . a debt of the state”), *and* State *ex rel.* Troy v. Yelle, 36 Wash. 2d 192, 194, 217 P.2d 337, 338 (1950) (defining debt as borrowed money).

168. *Supra* notes 58–61 and accompanying text.

drawn between the meaning of “debt” and “indebtedness.”<sup>169</sup> Accordingly, the argument that “debt” in section 1 is a term of art does not justify a broader treatment of “indebtedness” in section 6.

## 2. *Section 6 Is Not More Inclusive than Section 1*

Alternatively, the plurality could be arguing that section 6’s inclusion of “in any manner” means the section is broader than section 1 (which just refers to “debt”). This is problematic because section 6 alternates between “indebtedness” and “indebted in any manner” when defining the applicable limitations.<sup>170</sup> Therefore, reaching the plurality’s conclusion that section 6 is broader than section 1(d) on the basis of “in any manner” would also require recognizing two types of debt within section 6—one for “indebtedness” and one for “indebted in any manner.” Such an interpretation cannot be supported because (1) this distinction has not been recognized in previous cases, (2) *Wenatchee Events Center* made no reference to such a fundamental shift,<sup>171</sup> and (3) this interpretation is not supported by the discussions at the Constitutional Convention that evince the purpose behind article VIII.<sup>172</sup>

## 3. *Principles of Constitutional Construction Support an Identical Interpretation of “Debt” and “Indebtedness”*

Having presented and rejected two possible justifications for the lead opinion’s unsupported distinction between debt and indebtedness, the plurality’s conclusion is also not supported by Washington State principles of constitutional construction. Under these principles, the Court looks to the common, ordinary meaning of the words<sup>173</sup> but may also consider historical context.<sup>174</sup> If the words are unambiguous and the ordinary meaning leads to a reasonable conclusion, the terms are read

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169. See *supra* Part I.B.2.

170. See WASH. CONST. art. VIII, § 6 (prohibiting a municipality from being “indebted in any manner” beyond one and a half percent without assent but then limiting “indebtedness” with voter assent to five percent).

171. See *Wenatchee Events Center*, 175 Wash. 2d 788, 807, 287 P.3d 567, 577 (2012) (plurality opinion).

172. See JOURNAL, *supra* note 29, at 675–79 (presenting a record of the delegates’ debates about the debt limits without any indication that the delegates considered, let alone implemented, different methods of calculating municipal limits depending on whether the debt was incurred with or without voter assent).

173. *State ex rel. Albright v. City of Spokane*, 64 Wash. 2d 767, 770, 393 P.2d 231, 233 (1964).

174. *Wash. Water Jet Workers Ass’n v. Yarbrough*, 151 Wash. 2d 470, 477, 90 P.3d 42, 46 (2004).



according to this meaning rather than resorting to a forced construction to limit or extend the function.<sup>175</sup>

Turning first to the ordinary meanings of “debt” and “indebtedness,” there is no basis for distinguishing between the terms. Black’s Law Dictionary treats them as synonyms by defining “indebtedness” as “[s]omething owed; a *debt*.”<sup>176</sup> Bryan Garner further explained that the terms are functional equivalents: “[Indebtedness] is frequently used where the simpler word *debt* would be preferable” and “*indebtedness* is a NEEDLESS VARIANT of *debt*.”<sup>177</sup> Interpreting “debt” and “indebtedness” as distinct terms would require a forced construction to create a difference where none exists.

Second, the historical context offers no support for distinct interpretations of “debt” and “indebtedness.” The reasons for restricting state and municipal debt were identical.<sup>178</sup> There is no indication in the convention record that the delegates intended section 1 and section 6 to restrict different types of obligations.<sup>179</sup>

In sum, *Wenatchee Events Center* could have a broader than intended effect because the lead opinion’s treatment of “debt” and “indebtedness” as distinct concepts is an unsupported conclusion that fails to narrow the holding. Thus, the lead opinion could have a significant effect on both municipalities and the state by altering their current debt levels, changing available financing mechanisms, and increasing costs.<sup>180</sup> Accordingly, the Court should revisit and clarify *Wenatchee Events Center*’s discussion of debt.

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175. O’Connell v. Slavin, 75 Wash. 2d 554, 558, 452 P.2d 943, 946 (1969).

176. BLACK’S LAW DICTIONARY 836 (9th ed. 2009) (emphasis added). This definition is synonymous with the definition of debt: “liability on a claim; a specific sum of money due by agreement or otherwise.” *Id.* at 462. Even the lead opinion used the terms interchangeably earlier in the opinion. See *Wenatchee Events Center*, 175 Wash. 2d at 791–92, 287 P.3d at 569 (“Total municipal *debt* incurred without a public vote is limited” and “[o]ur state constitution limits municipal *indebtedness*” (emphasis added)).

177. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 436 (3d ed. 2009) (emphasis in original). Washington courts have looked to Garner’s work to help clarify definition and grammar issues in the past. *E.g.*, Flight Options, LLC v. State Dep’t of Revenue, 172 Wash. 2d 487, 502, 259 P.3d 234, 242 (2011) (citing BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 811 (2d ed. 1995), for the proposition that “situate” and “situated” are synonyms); Black v. Nat’l Merit Ins. Co., 154 Wash. App. 674, 688, 226 P.3d 175, 182 (2010) (citing BRYAN A. GARNER, A DICTIONARY OF AMERICAN LEGAL USAGE 453–54 (1st ed. 1998), for the proposition that “or” is not always used to indicate an alternative).

178. See *supra* Part I.A.1.

179. See JOURNAL, *supra* note 29, at 667–84.

180. See *supra* notes 20–21.

C. *Wenatchee Events Center's Risk-of-Loss Principle Is Not the Correct Framework for Examining Public Debt in Washington*

The Court should not embrace the risk-of-loss principle in subsequent opinions. First, the framework is not supported in Washington case law. Second, the framework is not used by other jurisdictions, which is an important consideration because the Court has recognized that article VIII is situated firmly within a nationwide tradition and has drawn from other jurisdictions to resolve public-debt questions.

1. *Washington Law Does Not Support the Risk-of-Loss Principle*

The risk-of-loss principle is not supported by Washington's case law on debt limits. This Essay highlights the lack of support by examining three problems with the lead opinion's attempt to justify the principle. First, the plurality re-characterized prior precedent without regard for the analysis applied in those cases. Second, the plurality ignored inconsistent cases. Third, the plurality relied on an academic piece that recognized that the risk-of-loss principle is not a talisman for all of Washington's debt cases and supported the principle's limited explanatory powers with problematic analysis.

a. *The Lead Opinion's Re-Characterization of Prior Cases Does Not Support the Conclusion that Risk of Loss Applies to Article VIII*

The lead opinion's establishment of the risk-of-loss principle by re-characterizing prior cases is problematic because the opinion conflates correlation with causation, ignores the Court's various approaches to debt limits, and fails to address the principle's absence in prior case law.

*Wenatchee Events Center* conflates correlation with causation by ignoring the underlying analysis in the cases that are re-characterized to establish the risk-of-loss principle.<sup>181</sup> The plurality establishes the principle by going through prior decisions and concluding that they are consistent with the risk-of-loss principle.<sup>182</sup> But the opinion never discusses whether the decisions were actually decided on that principle nor does the plurality address the underlying analysis used in those cases.<sup>183</sup> The plurality merely shows a correlation—the result in *some* of the Court's earlier decisions may be consistent with the risk-of-loss

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181. See *Wenatchee Events Center*, 175 Wash. 2d at 797–98, 287 P.3d at 572. For a discussion of how the lead opinion re-characterized prior cases see *supra* Part I.C.2.a.

182. *Wenatchee Events Center*, 175 Wash. 2d at 797–98, 287 P.3d at 572.

183. *Id.* at 797–98, 287 P.3d at 572–73.

principle—but never demonstrates that the Court used that principle to reach the result, let alone consistently approached cases using that framework.<sup>184</sup> The plurality does not show causation because they cannot show causation: The Court has not previously analyzed debt cases using the risk-of-loss principle.<sup>185</sup> Accordingly, the plurality does not demonstrate that the risk-of-loss principle is the basis for the results in previous cases, which undermines their reason for using the principle to address the *Comfort-State Capitol Commission* split and ultimately the CLA in *Wenatchee Events Center*.

Moreover, the re-characterization of prior cases to establish a single principle is problematic because that approach disregards the Court's history of employing various frameworks to guide the debt analysis. Like other jurisdictions, the Court resisted developing a general standard for determining whether obligations implicate the debt limits and instead relied on a diverse range of exceptions and principles.<sup>186</sup> The lack of a unifying framework becomes more evident by looking at some of the Court's debt cases where the Court fluctuated between relying extensively on the analysis conducted in other states<sup>187</sup> and at other times looking only to local opinions.<sup>188</sup> The variety of approaches the Court has embraced undermine the lead opinion's attempt to re-characterize prior opinions in order to recognize one guiding principle.

Finally, the re-characterization of Washington case law does not support the risk-of-loss principle because the lead opinion's analysis glosses over the fact that the Court had never expressly embraced the principle in the debt-limit context.<sup>189</sup> Despite over a century of case law

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184. *See id.*

185. *Supra* note 134.

186. *See* AMDURSKY & GILLETTE, *supra* note 38, § 4.1.1, at 162. For a sampling of the different approaches, see *Dep't of Ecology v. State Fin. Comm.*, 116 Wash. 2d 246, 254–55, 804 P.2d 1241, 1245 (1991) (plurality opinion) (lease-purchase agreements), *State ex rel. Troy v. Yelle*, 36 Wash. 2d 192, 195, 217 P.2d 337, 337 (1950) (warrant obligations for current year expenses), and *Winston v. City of Spokane*, 12 Wash. 524, 526–27, 41 P. 888, 888 (1895) (special-fund doctrine).

187. *See, e.g., Dep't of Ecology*, 116 Wash. 2d at 256–57, 256 n.9, 804 P.2d at 1246, 1246 n.9 (determining that Oregon's case law was persuasive and citing other states' opinions); *Troy*, 36 Wash. 2d at 204–07, 217 P.2d at 343–45 (looking to Oklahoma's constitution and case law).

188. *See, e.g., State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 652–61, 384 P.2d 833, 838–42 (1963) (clarifying the special-fund doctrine).

189. Before *Wenatchee Events Center*, the Court's article VIII cases applied the risk-of-loss framework in a majority opinion only when evaluating section 5's prohibition on the lending of state credit to private parties. *See* Wash. State Hous. Fin. Comm'n v. O'Brien, 100 Wash. 2d 491, 494–95, 671 P.2d 247, 249–50 (1983). However, the Court abandoned this framework following Professor Hugh Spitzer's *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. PUGET SOUND L. REV. 195 (1985). Wash. Higher Educ. Facilities Auth. v. Gardner, 103 Wash. 2d 838, 846–47, 699 P.2d 1240, 1244–45 (1985) (declining to use the risk-of-

interpreting section 1 and section 6, the term “risk of loss” has never appeared in a majority opinion addressing these issues. Before *Wenatchee Events Center*, the term was only used in the debt-limit context in *Department of Ecology*’s plurality opinion.<sup>190</sup> If the risk-of-loss principle guided each of the Court’s debt opinions, one would expect the term to have appeared: (1) before 1991, (2) within more than one opinion, or at least (3) inside a majority opinion. These absences reinforce the notion that the Court has not consistently relied on the risk-of-loss principle when determining how to evaluate article VIII.

Nonetheless, the plurality seizes on the language in *Department of Ecology* as evidence that that Court relied on the principle before *Wenatchee Events Center*. The lead opinion explained that in “recent cases” the Court has “begun explicitly relying on the risk of loss concept as a basis for our decisions” and presents *Department of Ecology* as an example of this trend.<sup>191</sup> The plurality is wrong for three reasons. First, there is no trend. *Department of Ecology* is not an example of recent cases relying explicitly on the risk-of-loss principle in the debt context—it is the *only* case. Second, the Court did not embrace the principle in *Department of Ecology* despite the opportunity to do so. A majority of the Court declined to sign onto the opinion using the risk-of-loss language.<sup>192</sup> Third, the scope of *Department of Ecology* is a matter of enough debate that the State Finance Committee has recommended a very narrow reading that limits reliance on the case’s holding to closely related facts.<sup>193</sup> The State Finance Committee, after reviewing the “vigorous dissent” and the concurrence’s emphasis that long-term leases should not be used as subterfuge, recommended that financing contracts only be used in fact patterns very similar to *Department of Ecology* in order to avoid having the agreements treated as debt.<sup>194</sup> This guidance reflects a concern that *Department of Ecology* is not the fundamental shift for which the plurality cites the case.

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loss approach and quoting Professor Spitzer’s Article). Moreover, lending credit and defining “debt” are distinct concepts, which the plurality acknowledged by not citing *O’Brien*. See generally *Wenatchee Events Center*, 175 Wash. 2d 788, 287 P.3d 567.

190. See *Dep’t of Ecology*, 116 Wash. 2d at 254–55, 804 P.2d at 1245 (using the principle without citation to any other cases).

191. *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572.

192. See *Dep’t of Ecology*, 116 Wash. 2d at 259, 804 P.2d at 1247 (noting that only three justices signed the lead opinion); *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) (explaining that a plurality is not binding on future courts).

193. See generally WASH. STATE FIN. COMM., GUIDELINES FOR USE OF FINANCING CONTRACTS (2011), available at [http://www.tre.wa.gov/documents/sfc\\_GuidelinesUseFinancingContracts.pdf](http://www.tre.wa.gov/documents/sfc_GuidelinesUseFinancingContracts.pdf).

194. See *id.* at 1–2.

*b. The Risk-of-Loss Principle Does Not Explain Washington Cases on Debt*

The analysis used to justify the risk-of-loss principle does not (and cannot) explain the diverse range of precedent on what is article VIII debt.<sup>195</sup> Before *Wenatchee Events Center*, the Court accepted the contingent-liability doctrine—a framework that is incompatible with the risk-of-loss principle.<sup>196</sup> The lead opinion carefully avoids this issue by asserting the risk-of-loss principle through a limited survey of Washington cases; the plurality looks at cases that support their position and ignores cases like *Kelly* and *Comfort* that do not fit the framework.<sup>197</sup> The plurality addresses these unsupportive cases only after establishing the framework they contend explains Washington law: the risk-of-loss principle.<sup>198</sup> It is easier to “find” principles when the search looks for authority that supports the idea and sets aside contradictory materials.

*c. The Lone Academic Piece Embracing the Risk-of-Loss Principle for Washington Cases Offers a Tentative and Incomplete Analysis*

Academics have not embraced the idea that the risk-of-loss principle explains Washington’s public debt cases. The idea has been presented in only one place: Gillette’s *Municipal Debt Finance Law: Theory and Practice*.<sup>199</sup> Despite academia not embracing Gillette’s conclusion, the plurality relies in part on Gillette’s analysis as part of the basis for establishing the risk-of-loss principle.<sup>200</sup> This reliance is problematic for two reasons: (1) Gillette is unwilling to assert that risk of loss fully explains Washington debt cases, and (2) Gillette’s analysis is incomplete

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195. See AMDURSKY & GILLETTE, *supra* note 38, § 4.1.1, at 162. Even the plurality agrees that the risk-of-loss framework only explains some of the cases. See *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572 (“Nearly every case . . . is consistent with this ‘risk of loss’ principle” (emphasis added)).

196. See *Wenatchee Events Center*, 175 Wash. 2d at 801, 287 P.3d at 574.

197. See *id.* at 797–99, 287 P.3d at 572–73 (establishing the risk-of-loss principle by looking to *City of Spokane*, *Martin*, and *Department of Ecology* without discussing *Comfort* and *Kelly*).

198. See *id.* at 799, 800–02, 287 P.3d at 573–74 (establishing principle and discussing *Comfort*).

199. This book is the only academic source cited by either the lead opinion or the plaintiff’s brief. See generally *id.*, 175 Wash. 2d 788, 287 P.3d 567; Brief of Respondent City of Wenatchee, *Wenatchee Events Center*, 175 Wash. 2d 788, 287 P.3d 567 (2012) (No. 86552-3). A search of common legal resources reveals no other sources asserting this proposition. Moreover, one can fairly assume that if other sources supported the plurality’s fundamental shift then they would have bolstered their position by position by citing additional sources.

200. See *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572.

and misleading.

i. *Gillette Does Not View the Risk-of-Loss Principle as a Talisman for All of Washington's Debt Cases*

Gillette is only willing to support the idea that the risk-of-loss principle is, at best, a partial answer for when debt has been recognized in Washington. He acknowledges that his argument has limited explanatory powers: The “[a]pplication of [the risk-of-loss principle] brings a high, though by no means complete, degree of consistency to an otherwise irreconcilable body of cases”<sup>201</sup> and the principle “does bring *some* order to the [Court’s] decisions.”<sup>202</sup> Contrary to the lead opinion’s assertion, Gillette is not concluding that the risk-of-loss principle determines when an obligation triggers Washington’s debt limits.<sup>203</sup> Rather, his conclusion is more nuanced; he believes the risk-of-loss principle can, at best, explain why the debt limit is triggered in *some* of the Court’s public debt cases.<sup>204</sup>

ii. *Errors in Gillette’s Analysis Undermine His Conclusion that the Risk-of-Loss Principle Is Applicable*

Gillette’s limited explanation of Washington’s public debt cases is also problematic because it is based on incomplete and misleading analysis. First, he glosses over or ignores critical cases that are not explained by the proposed framework.<sup>205</sup> He relegates *Comfort* to a footnote with a “but see” citation and no analysis—he does not try to explain how this case can be explained by the risk-of-loss principle and does not even address *Kelly*.<sup>206</sup> Gillette does not offer an explanation because he cannot: The cases are not reconcilable with the risk-of-loss principle.<sup>207</sup> Accordingly, his conclusion is clouded by selection bias—

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201. AMDURSKY & GILLETTE, *supra* note 38, § 4.1.1, at 162.

202. *Id.* § 4.1.2, at 169 (emphasis added).

203. Compare *id.* (recognizing that the risk-of-loss principle does not fully explain the Court’s opinions on debt), with *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572 (summarizing Gillette’s position as “concluding that [Washington’s] debt limits are triggered where the risk of project failure falls on the taxpayers”).

204. See AMDURSKY & GILLETTE, *supra* note 38, § 4.1.1, at 162. But even this conclusion is problematic because Gillette makes the same mistake as the plurality: conflating correlation with causation. He surveys Washington cases saying how the risk-of-loss principle could explain the results in those cases but never explains how the analysis in those cases supports the principle.

205. See *id.* § 4.1.2, at 164–70.

206. *Id.* § 4.1.2, at 167 n.17.

207. See *Wenatchee Events Center*, 175 Wash. 2d at 801, 287 P.3d at 574.

effectively ignoring cases that challenge his analysis—that allows him to draw inappropriate conclusions about Washington’s debt law.

Second, Gillette misrepresents *Department of Ecology* to manufacture stronger support for the risk-of-loss principle. He incorrectly asserts that the Court expressly relied on the principle.<sup>208</sup> However, Gillette does not disclose that *Department of Ecology*’s risk-of-loss discussion had limited-precedential value because it occurred in a plurality opinion.<sup>209</sup> He ventures beyond mere omission because he inaccurately states “the majority opinion explicitly based its decision on the issue of risk.”<sup>210</sup> Without this statement, Gillette’s conclusion about Washington’s use of the risk-of-loss principle would have relied only on inferences—a weaker analytical tool—because the Court never explicitly addressed the principle before *Department of Ecology*. Thus, Gillette’s misrepresentation of the case’s nature artificially inflates the support for his theory on the risk-of-loss principle. This misdirection underscores the weakness of his analysis for explaining a broad range of cases that Gillette earlier generally referred to as “irreconcilable” and decidedly “ad-hoc.”<sup>211</sup>

## 2. *The Court Should Reject the Risk-of-Loss Principle Because It Disregards the Common Origins of Article VIII*

The lead opinion’s adoption of the risk-of-loss principle is problematic because the Court has indicated other jurisdictions’ analyses of debt provisions are persuasive and no other state has embraced the principle. Before *Wenatchee Events Center*, the Court recognized the state’s debt limits originated as part of a national trend by turning to other jurisdictions’ case law to help interpret article VIII and embracing principles used by other states. The absence of the risk-of-loss principle in these other jurisdictions suggests that the principle is not applicable to Washington’s debt limits.

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208. AMDURSKY & GILLETTE, *supra* note 38, § 4.1.2, at 168.

209. *See id.* § 4.1.2, at 168; *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) (stating plurality opinions are not binding).

210. AMDURSKY & GILLETTE, *supra* note 38, § 4.1.2, at 168 (emphasis added). Moreover, Gillette’s book was published in 1992, which was before the State Finance Committee cast significant doubt on *Department of Ecology*’s scope of the opinion. *See supra* text accompanying note 194.

211. AMDURSKY & GILLETTE, *supra* note 38, § 4.1.1, at 162.

a. *Washington and Other States Have Recognized the Common Origins of Their Debt Limits by Interpreting Them Similarly*

Given the common motivation for restricting government debt and the similar structure of the debt-limit provisions,<sup>212</sup> it is unsurprising that courts in different jurisdictions have analyzed their debt limits by developing and applying relatively consistent principles. A fifty-state survey of municipal-debt-provision schemes shows the same principles have been applied by most of the states.<sup>213</sup> For example, most states have created a lease-purchase exception, developed a special-fund doctrine, and recognized that contingent-liabilities are not debt.<sup>214</sup>

Before *Wenatchee Events Center*, the Court joined these other states in implicitly recognizing a harmony between constitutional-debt limits throughout the United States. Specifically, the Court signaled there was a harmony between Washington's provisions and those in other states by: (1) looking to other jurisdictions for guidance or support,<sup>215</sup> and (2) using the same principles that were adopted in other states.<sup>216</sup> This practice of interpreting article VIII by looking to other jurisdictions and applying similar principles indicates that the debt-limit provisions have not, and should not, be read without consideration of the practices in other states.

b. *The Lack of Risk-of-Loss Cases in Other States Supports the Conclusion that the Framework is Not Applicable to Article VIII*

Because the Court has indicated that the practices in other states are

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212. *Supra* Part I.A.1–2.

213. *See generally* MISS BETTIE MANN & DR. FREDERICK L. BIRD, STATE CONSTITUTIONAL RESTRICTIONS ON LOCAL BORROWING AND PROPERTY TAXING POWERS (1964) (surveying each state and noting if they had recognized specific principles).

214. *See generally id.* While there is some variance, courts generally agree on the basic principles and doctrines that apply—even if they are applied slightly differently depending on the jurisdiction. *See, e.g.,* Bisk, *supra* note 22, at 523–25 (explaining that there are a variety of approaches for lease-purchase agreements).

215. *See, e.g.,* Dep't of Ecology v. State Fin. Comm., 116 Wash. 2d 246, 256–57 & n.9, 804 P.2d 1241, 1246 & n.9 (1991) (plurality opinion) (citing and discussing cases from Colorado, Florida, Illinois, Kansas, Maine, Nebraska, Oregon, New Mexico, New Jersey, South Carolina, Texas, Virginia, West Virginia, and Wisconsin).

216. *Compare id.* at 255, 804 P.2d at 1245 (lease-purchase agreements), and *Winston v. City of Spokane*, 12 Wash. 524, 526–27, 41 P. 888, 888 (1895) (special-fund doctrine), with Charles, W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 WAKE FOREST L. REV. 925, 935–36 (1991) (acknowledging that lease-purchase agreements, the special-fund doctrine, and other approaches have been embraced by state courts). *See also* MANN & BIRD, *supra* note 213 (detailing the debt principles adopted in every state).



instructive, the absence of the risk-of-loss principle in these states indicates that the principle is not applicable to Washington's debt limits. A survey of other states indicates that no other state has adopted the risk-of-loss principle to resolve constitutional-debt cases—Washington would be the first.<sup>217</sup> Rather than adopting the principle, many states have adopted a mutually exclusive principle: the contingent-liability doctrine.<sup>218</sup> Thus, the practice in other states suggests that the risk-of-loss principle is not the correct framework for article VIII. To nonetheless adopt the principle, the Court would have to deny the common origins of article VIII and treat the provisions as novel. Such an approach is not supported by the Court's precedent or the history of article VIII.

*D. The Court Should Consider Adopting the Governmental Accounting Standards Board's Evaluation of Contingent Obligations to Evaluate Article VIII Debt*

If the Court declines to abandon categorizing CLAs as debt, the Court should consider evaluating these agreements by using the Governmental Accounting Standards Board's ("GASB")<sup>219</sup> Generally Accepted Accounting Principles ("GAAP")<sup>220</sup> for nonexchange financial guaranties<sup>221</sup> rather than the risk-of-loss principle. The GAAP provide standardized accounting standards for state and local governments

217. A search of traditional legal sources turned up no results, *Wenatchee Events Center's* lead opinion cited no authority that had reached a similar conclusion, and Gillette provides a relatively detailed analysis of the concept without citing or quoting from a case outside of Washington explicitly applying the concept. *See generally Wenatchee Events Center*, 175 Wash. 2d 788, 287 P.3d 567 (2012) (plurality opinion); AMDURSKY & GILLETTE, *supra* note 38, § 4.1, at 160–70.

218. *See Wenatchee Events Center*, 175 Wash. 2d at 801, 287 P.3d at 574 (explaining that the risk-of-loss principle and contingent-liability doctrine are incompatible); MCQUILLIN, *supra* note 82, § 41.22 (recognizing that many states have adopted the contingent-liability doctrine).

219. The GASB develops the United States' Generally Accepted Accounting Principles for state and local governments. GOVERNMENTAL ACCOUNTING STANDARDS BD., FACTS ABOUT GASB 1 (n.d.), available at [http://www.gasb.org/cs/ContentServer?c=Document\\_C&pagename=GASB%2FDocument\\_C%2FGASBDocumentPage&cid=1176164672329](http://www.gasb.org/cs/ContentServer?c=Document_C&pagename=GASB%2FDocument_C%2FGASBDocumentPage&cid=1176164672329) [hereinafter GASB FACTS].

220. While the GAAP is used outside the United States, this Essay will use "the GAAP" to refer exclusively to the GASB's version that only addresses practices for jurisdictions within the United States. *See* GASB FACTS, *supra* note 219, at 1.

221. This type of agreement is identical to the contingent liabilities addressed throughout this Essay: A party agrees to pay a debtor's obligation under specific conditions without receiving value or approximately equal value in exchange for entering the agreement. *See* GOVERNMENTAL ACCOUNTING STANDARDS BD., ACCOUNTING AND FINANCIAL REPORTING FOR NONEXCHANGE FINANCIAL GUARANTEES 2 (2013) [hereinafter GAAP GUARANTIES], available at [http://gasb.org/jsp/GASB/Document\\_C/GASBDocumentPage?cid=1176162551665&acceptedDisclaimer=true](http://gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176162551665&acceptedDisclaimer=true).

within the United States.<sup>222</sup> Although governments are not required to follow the GAAP, the principles are widely used in Washington<sup>223</sup> and nationwide.<sup>224</sup> Since 1984, the GAAP have been established by the GASB—a non-profit private organization that develops the standards through an open process that invites public feedback and expert participation.<sup>225</sup> The GASB produces a product analogous to the Financial Accounting Standards Board’s (FASB) principles governing the preparation of financial reports by nongovernmental entities; however, the GASB’s principles—unlike the FASB’s—are not officially recognized as authoritative by the Securities and Exchange Commission.<sup>226</sup>

The GAAP for nonexchange financial guaranties are set forth in GASB Statement 70 (“Statement 70”).<sup>227</sup> The principles established in Statement 70 require a government abiding by the GAAP to recognize a liability for the amount that is likely to become owed on a contingent obligation. Specifically, each government must reassess its agreements each year and recognize a liability when “qualitative factors”<sup>228</sup> and

222. *Mission, Vision, and Core Values*, GOVERNMENTAL ACCOUNTING STANDARDS BD., <http://www.gasb.org/jsp/GASB/Page/GASBSectionPage&cid=1175804850352> (last visited Mar. 27, 2015); see also OFFICE OF FIN. MGMT., STATE ADMINISTRATIVE AND ACCOUNTING MANUAL Ch. 80.20.10 (2014) (“Adherence to the GAAP provides a reasonable degree of comparability among the financial reports of state and local governmental units.”).

223. See WASH. REV. CODE § 43.88.037 (2014) (adopting the GAAP for the state government); GAAP VERSUS CASH REPORTING, WASH. STATE AUDITOR’S OFFICE (n.d.), available at [http://www.sao.wa.gov/resources/Documents/GAAP\\_Reporting\\_proscons.pdf](http://www.sao.wa.gov/resources/Documents/GAAP_Reporting_proscons.pdf) (noting that twenty percent of local governments used the GAAP but that they are the largest and most complex governments).

224. See GOVERNMENTAL ACCOUNTING STANDARDS BD., RESEARCH BRIEF: STATE AND LOCAL GOVERNMENT USE OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR GENERAL PURPOSE EXTERNAL FINANCING REPORTING 1–2, 5 tbl.1 (2008), available at [http://www.gasb.org/cs/ContentServer?site=GASB&c=Document\\_C&pagename=GASB%2FDocument\\_C%2FGASBDocumentPage&cid=1176156726669](http://www.gasb.org/cs/ContentServer?site=GASB&c=Document_C&pagename=GASB%2FDocument_C%2FGASBDocumentPage&cid=1176156726669) (estimating that between 62.27% and 71.52% of state and local government entities follow the GAAP based on a sample that represents 98% of all government revenue).

225. GASB FACTS, *supra* note 219, at 1–2.

226. Compare *id.* (explaining that the GASB’s GAAP are not federal laws or regulations), with *Facts About FASB*, FIN. ACCOUNTING STANDARDS BD., [www.fasb.org/facts/](http://www.fasb.org/facts/) (last visited Mar. 27, 2015) (explaining the FASB’s standards are officially recognized by the SEC).

227. GAAP GUARANTIES, *supra* note 221 (Statement 70); see GOVERNMENTAL ACCOUNTING STANDARDS BD., THE HIERARCHY OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR STATE AND LOCAL GOVERNMENTS 1–4 (2009), available at [http://www.gasb.org/jsp/GASB/Document\\_C/GASBDocumentPage?cid=1176159972129&acceptedDisclaimer=true](http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176159972129&acceptedDisclaimer=true) (establishing GASB Statements as the most authoritative source of the GAAP).

228. Examples of qualitative factors include the debtor: (1) entering bankruptcy, (2) breaching the contract creating the underlying debt (e.g. not meeting covenants or defaults in payments), or (3) demonstrating signs of significant financial difficulty (e.g. drawing on reserve funds to make

historical data, if any, . . . indicate that it is more likely than not that the government will be required to make a payment.”<sup>229</sup> The liability would equal “the discounted present value of the best estimate of the future outflows expected to be incurred.”<sup>230</sup>

Statement 70 and its principles for nonexchange financial guaranties could be used in the article VIII context by counting the assessed liability as debt. There are three reasons why this approach would be preferable to the risk-of-loss principle embraced by *Wenatchee Events Center*’s lead opinion. First, in contrast to the lead opinion’s unclear treatment of contingent obligations,<sup>231</sup> Statement 70 offers a clear standard that will be easier for the Court and municipalities to apply.<sup>232</sup> This is important for municipalities whose effectiveness depends, at least in part, on being able to understand what constitutes debt so that they can determine what projects can be pursued. Second, Statement 70’s standard protects municipal- and state-financial flexibility by facilitating the use of a common-funding mechanism without triggering the sudden and unexpected recognition of debt that is likely to occur under the risk-of-loss framework.<sup>233</sup> Preserving this flexibility comports with the Court’s precedent,<sup>234</sup> is consistent with national trends,<sup>235</sup> and is important for the variety of projects that the state and municipalities frequently undertake.<sup>236</sup> Third, Statement 70’s reliance on experts (accountants) creates a more accurate, nuanced perspective of debt—recognizing it is only money that is, or is likely to become, due—rather than the more draconian all-or-nothing rule advanced by *Wenatchee Events Center*.

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debt payments, seeking debt-holder concessions, incurring significant investment losses). GAAP GUARANTIES, *supra* note 221, at 3.

229. *Id.* “[M]ore likely than not” means a likelihood of more than fifty percent. *Id.* at 4 n.2.

230. *Id.* at 4.

231. *See supra* Part II.A (highlighting the seemingly contradictory nature of the opinion and the lack of guidance for determining what percentage makes an obligation a guaranty rather than a contingent liability).

232. In fact, the state is already applying this standard and many local governments are as well. *See supra* note 223.

233. If the Court adopted the risk-of-loss principle in a majority opinion—removing any doubt about its applicability—there would likely be a sudden increase in the amount of debt recognized by municipalities. *See supra* note 2 (explaining the value of debt secured by existing CLAs). In fact, even the uncertainty about the treatment of CLAs has caused some municipalities to recognize more debt because of their existing CLAs. *Supra* note 21.

234. *See supra* note 216 (highlighting the various exceptions recognized in Washington).

235. Heil, *supra* note 28, at 86 (recognizing a national trend of courts approving methods for evading rigid limits).

236. *See* Brief of Amicus Curiae in Support of Direct Review, *supra* note 2, at 11.

Statement 70 not only has these three distinct advantages over *Wenatchee Events Center*'s risk-of-loss approach, but the statement also addresses the plurality's concern about CLAs: municipalities guarantying debt without regard for their limits and then being forced to resort to taxes when the agreements suddenly came due.<sup>237</sup> Under Statement 70, municipalities are unlikely to lightly enter into CLAs because the potential burden is not just an obligation to make a payment in the distant future but is also a present-day concern: part of the value can count against their debt limit each year. The likelihood that municipalities will enter into CLAs without careful deliberation is further minimized by the limited volatility introduced by Statement 70's standard: Debt from CLAs will be added or subtracted annually based on the likelihood that a payment will have to be made.<sup>238</sup> By creating the potential for a more immediate effect on the debt limit, Statement 70 should encourage officials to thoroughly scrutinize a potential CLA rather than merely looking at the short-term gains. Thus, Statement 70's volatility responds to one of the concerns underlying debt restrictions: limiting the perverse incentive politicians have to enter into guaranties for short-term gain without regard for the potential long-term costs.<sup>239</sup>

## CONCLUSION

*Wenatchee Events Center*'s lead opinion's adoption of the risk-of-loss principle and treatment of contingent liabilities as debt are problematic. As soon as practicable and in an appropriate case, the Court should grant a petition for review addressing these topics because *Wenatchee Events Center* is unclear, has a broader than intended scope, and recognizes an incorrect framework for public debt. The lead opinion's inconsistent treatment of contingent liabilities and failure to garner a majority means the opinion does not offer clear guidance to policy makers or courts. Beyond a lack of clarity, the opinion has a broader than intended scope because the attempt to compartmentalize the holding by limiting it to municipal debt—based on a distinction between “debt” and “indebtedness”—is not persuasive. Finally, the adoption of the risk-of-loss principle—used to justify the treatment of contingent liabilities as debt—is not supported by case law, academics, or the origins of Washington's debt-limit provisions.

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237. *Wenatchee Events Center*, 175 Wash. 2d 788, 801–02, 287 P.3d 567, 574 (2012) (plurality opinion).

238. GAAP GUARANTIES, *supra* note 221, at 4.

239. *See* Bisk, *supra* note 22, at 525.

After granting a petition for review, the Court should decline to adopt the risk-of-loss principle and instead provide a clear, easily applicable rule on contingent liabilities. This is important because the frequent use of CLAs as a funding mechanism makes clarity and predictability critical factors. In pursuit of this goal, the Court should look to the GAAP on nonexchange financial guaranties. This standard would require municipalities to annually evaluate their contingent liabilities and recognize debt for any amounts that are likely to become due. This approach is preferable because it balances clarity and flexibility with appropriate safeguards against improvident decision-making.

In sum, the Court should address the problematic analysis adopted by *Wenatchee Events Center*'s lead opinion while offering a clear and binding rule about the status of contingent liabilities. One avenue to explore would be using the GAAP for nonexchange financial guaranties.